Supreme Court, U.S.
FILED
JUN 25 1984
ALEXANDER L. STEVAS
CLERK

No. 9, Original

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA, ET AL.
(ALABAMA AND MISSISSIPPI BOUNDARY CASES)

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE UNITED STATES AND SUPPORTING BRIEF

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DONALD A. CARR
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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EXCEPTIONS OF THE UNITED STATES

The United States excepts to the Report of the Special Master insofar as it includes the following recommended rulings:

1. That Dauphin Island should be treated as part of the mainland and as one arm of a juridical bay;

2. That if Dauphin Island is properly treated as a part of the mainland, the juridical bay thereby created encompasses the whole of Mississippi Sound, rather than the area enclosed by a line from the western tip of Dauphin Island northwesterly to Point Aux Chenes on the mainland, just west of the Missippi-Alabama boundary;

3. That, regardless of its status as a "juridical" bay, the whole of Mississippi Sound constitutes "historic" inland waters.

Instead, the United States urges the Court to fix the seaward limit of the submerged lands owned by the States of Mississippi and Alabama at the outer line of the territorial sea as depicted on official charts issued by the National Ocean Service.

Respectfully submitted.

REX E. LEE
Solicitor General

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ON THE REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT OF ITS EXCEPTIONS

STATEMENT

In 1960, in renewed proceedings following passage of the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, this Court held that the grant of seabed to Alabama and Mississippi (like the grant to Louisiana and unlike the case of Texas and Florida) extends no more than three nautical miles into the Gulf of Mexico from their respective coastlines. *United States* v. *Louisiana*, 363 U.S. 1, 79-82, 83 (1960). See, also, the Decree entered at the following Term, 364 U.S. 502 (1960). The Court did not, however, locate the "coastline" from which that three-mile belt

is to be measured (363 U.S. at 66-67 n.108, 82 nn. 135 and 139), except to specify—in accordance with the Submerged Lands Act, 43 U.S.C. 1301(c)—that where State "inland waters" exist the coastline must be deemed to be "the line marking the seaward limit" of such inland water bodies. 364 U.S. at 503. Jurisdiction was retained to resolve any dispute in locating the relevant coastline. 363 U.S. at 84; 364 U.S. at 504.

In due course, it became clear that the parties disagreed about the status of Mississippi Sound, the water area immediately south of the mainland shore of Mississippi and Alabama, stretching from Lake Borgne at the west to Mobile Bay at the east. See Chart 1, App., *infra*.[1] The two States viewed the whole of Mississippi Sound as part of their "inland" (or "internal") waters, so that their coastlines only began at the islands fringing that Sound and lines connecting those "barrier islands." The United States, on the other hand, denied the inland status of Mississippi Sound and, accordingly, claimed as areas of exclusive federal interest those portions of the Sound that are more than three miles from any land (mainland or island) or undisputed inland rivers or bays. See BLM Leasing Map at Report 57. Such "enclaves"—comprising pockets of high seas in our view —exist because some of the barrier islands, or portions of them, are more than six miles from the mainland mass.

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[1] As an aid to the Court, we have appended three charts to this brief. In each case, the base map is a simplified tracing from the BLM Leasing Map included in the Special Master's Report (at 57), slightly extended to include marginal areas to both the western and eastern ends of the Master's map. Our Chart 1 is intended to offer an unencumbered picture of the relevant geographical features.

To resolve this issue, the parties filed motions and cross-motions for a supplemental decree and the Court referred all the pleadings to its Special Master, already appointed in the *Louisiana Boundary Case*. 444 U.S. 1064 (1980); 445 U.S. 923 (1980). So, also, the Court later referred to the Master a Motion for Relief from Final Decree filed by Mississippi in order to avoid the preclusive effect of the Decree entered in 1960. 457 U.S. 1115 (1982). After extended proceedings, the Special Master has submitted his Report to the Court recommending a decree in favor of the States. In his view, the whole of Mississippi Sound qualifies as a "juridical" bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609 (Report 7-22) and, in addition, satisfies the criteria for an "historic" bay, comprising inland waters (Report 22-55).

SUMMARY OF ARGUMENT

I

The Special Master first addressed the question whether Mississippi Sound qualifies as a "juridical bay" by satisfying the several tests announced by Article 7 of the international Convention on the Territorial Sea (which this Court has made applicable to coastline determinations under the Submerged Lands Act). A necessary premise of the Master's affirmative conclusion was that Dauphin Island, at the east of the Sound, should be deemed a part of the mainland mass to the north. That finding, we submit, is entirely unjustified and, indeed, inconsistent with this Court's specific precedents on the point—notably the rulings made in the *Louisiana Boundary Case*.

Apparently recognizing as much, the Special Master here relied on the circumstance that the island in question adjoins the concededly inland waters of Mobile Bay, which, in his view, should be assimilated to land. Once again, this ruling directly conflicts with the rejection of the same argument (both by the Master and the Court) in the *Louisiana Boundary Case*. The contention is, moreover, wholly at odds with the governing Convention, which does not confuse inland waters with mainland or treat islands abutting inland waters as peninsulas.

II

Even if the Special Master were justified in treating Dauphin Island as part of the mainland, it does not follow that the whole of Mississippi Sound constitutes a single juridical bay. The Master reached that result only by ignoring the first neutral question: What waters appear to be "enclosed" by Dauphin Island, once we accept the island as an extension of the mainland? A glance at the map tells us immediately that the closing line defining the "landlocked waters" of such a putative bay, beginning (as all agree) at the western tip of Dauphin Island, must proceed to the northern mainland, less than ten miles away, and not to Isle au Pitre, some five times more distant at the western end of the Sound. The same point holds good on the other side of the Sound, where a bay closing line anchored on Isle au Pitre would naturally aim for the near northern mainland, not easterly to remote Dauphin Island.

Accordingly, even if we must treat Dauphin Island as a part of the mainland, the resulting juridical bay is a much smaller one than the Special Master supposed. The water area defined, on the north, by the essentially unindented straight mainland coast, and,

on the south, by the barrier islands, no doubt would qualify for inland status under Article 4 of the Convention if the United States chose to invoke the straight baseline system permitted by that provision. But, as this Court has firmly settled, such a decision is reserved to the federal Executive. In the meanwhile, it is impermissible to bend the bay rules of Article 7 to achieve a result deliberately eschewed by the United States.

III

As an independent ground for his conclusion that the whole of Mississippi Sound is inland water, the Special Master ruled that the area should be deemed an "historic bay." In so holding, we believe the Master disregarded the very heavy burden resting on the proponents of such a claim, especially in the face of a formal disclaimer by the United States. At all events, the evidence summarized in the Report does not remotely show that, at any time during American sovereignty, the exclusion of peaceful foreign vessels was attempted, much less accomplished in such a notorious way, and for such a substantial period, as to ripen into an accepted usage.

At best, it was suggested that, at some unconnected periods, the United States, more or less officially, fashioned or accepted coastline delimitation principles that might have encompassed Mississippi Sound as inland waters. But this, if relevant at all, does not approach the demonstration, which must be "clear beyond doubt," of a ripened title acquired by openly adverse possession. Indeed, as it seems to us, the present case for historic title is substantially weaker than in the controveries involving California, Louisiana and Alaska, and, having failed there, the claim ought not be seen to succeed here.

ARGUMENT

I. DAUPHIN ISLAND IS NOT AN EXTENSION OF THE MAINLAND AND DOES NOT FORM A JURIDICAL BAY

1. If we put to one side his ruling on the claim of "historic inland waters" (see pages 20-33, *infra*), the Special Master was perfectly clear (and correctly so, in our view) that no part of Mississippi Sound—as distinguished from Lake Borgne at the west and Mobile Bay at the east and discrete small bays in between (see Chart 2, App., *infra*)—qualifies as a "juridical" bay under Article 7 of the Convention on the Territorial Sea unless Dauphin Island, at the eastern end of the Sound, properly can be treated as an extension of the mainland mass and, accordingly, deemed the headland of a bay. Report 3-12 & n.4, 18 n.7.[2] We therefore focus our attention first on the

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[2] Thus, the Master expressly rejected an argument premised on what he termed "completely immaterial" evidence that the waters of Mississippi Sound and the northern shore of the barrier islands had "inland" characteristics. Report 3-4. In light of the terms of the Convention and the Submerged Lands Act, the Master likewise dismissed as not "pertinent" the alleged inaccessibility of the "enclaves" of high seas resulting from the federal position. *Id.* at 4. He also found that the United States had not "in fact," nor explicitly, adopted a system of straight baselines anchored on the barrier islands to enclose Mississippi Sound as inland waters under Article 4 of the Convention. *Id.* at 5-7. Pretermitting the question of "historic inland waters," the Master accordingly confined himself to determining whether Mississippi Sound meets the tests of Article 7 as a "juridical" bay. *Id.* at 7-22. In concluding that two of the basic criteria for such a bay are satisfied—a closing line not exceeding 24 miles and a well marked indentation containing land locked waters—the Master plainly relied on the premise that Dauphin Island is an extension of the mainland. *Id.* at 12, 18 n.7, 19. Indeed, there is no other

dispositive question whether, in the eye of the law, Dauphin Island should, indeed, be viewed as a part of the mainland and not as the island that nature seems to have created.

In a different case, such an issue might invite discussion how much deference this Court, exercizing its constitutionally defined original jurisdiction, should accord to its Special Master's "finding." See *Colorado* v. *New Mexico*, No. 80, Orig. (June 4, 1984), slip op. 6. Compare *United States* v. *Louisiana*, 446 U.S. 253, 273 (1980) (Opinion of Powell, J.), with *Mississippi* v. *Arkansas*, 415 U.S. 289, 296-297 (1974) (Douglas, J., dissenting). But there is no occasion to debate that interesting question here because the Master's error is one of law. In no sense did the Master assess conflicting testimony or sift evidence to resolve any factual dispute. The facts underlying the conclusion that Dauphin Island is an extension of the mainland were never in controversy, and those on which the Master relied were for the most part stipulated or easily discernible from published charts. Nor did the Master choose among experts, accepting one opinion as more persuasive than another. His Report does not even advert to expert testimony and, indeed, his conclusion is confessedly the product of independent reasoning from agreed facts. And, finally, there is nothing complex or elusive about the issue.

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way of satisfying Article 7. As the Master noted, a closing line to Mobile Point exceeds 24 miles, with no possible "fall back line," and, besides, Mobile Point being within Mobile Bay, a separate body of water, cannot be the headland of a bay encompassing Mississippi Sound. *Id.* at 10 n.4, 18 n.7. Yet, at the east, no other headland is available if Dauphin Island is treated as an island and therefore, as the Master agreed (*id.* at 8), cannot help form a bay.

In sum, this Court is at no disadvantage in deciding the question for itself, and certainly no special difficulty embarrasses the Court's determination whether the Master's reasoning is flawed in that he mistakenly treated water as land because it was inland. There is, in truth, no occasion to stray beyond the half-dozen pertinent pages of the Master's Report (at 12-18). No reference to the underlying record is necessary.

2. We do not here repeat the complete survey of this Court's precedents on island assimilation which we undertook in the Brief of the United States in Support of Its Exception at 8-19 in No. 35, Original, *United States* v. *Maine* (*Rhode Island* and *New York*).[3] Suffice it to say that, on the face of it, treating Dauphin Island as an extension of the mainland is entirely inconsistent with the teaching of those precedents. As the Special Master noted (Report 16-17, 18 n.7), Dauphin Island is "long and narrow," extending from east to west and lying at right angles to the "projection of Cedar Point," the nearest mainland, from which, however, it is separated by 1.6 miles of water, a "strait" some seven feet deep, exclusive of dredged channels.[4] Such a formation is ob-

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[3] Copies of that brief have been served on opposing counsel.

[4] The Special Master wholly fails to explain why he discounts *dredged* channels. See Report 16. So far as we are aware, there is no basis for disregarding the existence, or *actual* depth and utility, of a channel simply because that reality is attributable in whole or in part to dredging, at least when the dredging has been undertaken for more than a century and presumably will continue indefinitely. The Court's rejection of dredged channels as qualifying "harbour works" in the *Louisiana Boundary Case*, 394 U.S. at 36-40, is, of course, irrelevant. Dredged channels were there found ineffective because they are not raised structures, not because they

viously less qualified, as a matter of geography, to be deemed a part of the mainland than many of the islands considered in the *Louisiana Boundary Case*, 394 U.S. 11 (1969); 420 U.S. 529 (1975), including the Isles Dernieres, twice rejected as forming "Caillou Bay." See U.S. Brief at 12-16, in No. 35, Original, *supra*.

Unsurprisingly, the Special Master (having served in the same capacity in the *Louisiana Boundary Case*) readily conceded the point. He expressly stated his belief (Report 13) that "the total water gap distance between the northern tip of Dauphin Island and Cedar Point on the mainland * * * is * * * more than was contemplated by the Court in the language quoted from *United States* v. *Louisiana*, *supra*." So, also, the Master correctly rejected the argument that "[t]he degree of development of the island for human habitation and use" somehow transformed Dauphin

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are artificially created. Indeed, artificially caused extensions of the mainland that produce a new low-water line normally *do* change the coastline. See *United States* v. *California*, 381 U.S. 139, 176-177 (1965); *Louisiana Boundary Case*, 394 U.S. at 41 n.48; *United States* v. *California*, 447 U.S. 1, 5-8 (1980); *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273, 284-286 (1982). It seems obvious that like effect must be given to physical changes in the opposite direction attributable to artificial causes. And, to the extent that "the depth and utility of the intervening waters" is relevant in deciding whether an island should be treated as part of the mainland (*Louisiana Boundary Case*, 394 U.S. at 66), it ought not matter whether the channel is maintained by man or nature. We may add that the "legislative history" of the Convention makes it clear that navigability—whether natural or enhanced by man—is not to be taken into account, as a matter of international law, in determining whether a water body qualifies as a juridical bay. The concept was deprecated as a vague one with no meaning except in terms of a particular vessel. I *Yearbook ILC* 220 (1955).

Island into an extension of the mainland. Report 13. As he unambiguously observed (*ibid.*), this has "no bearing upon the issue whatever." And, although somewhat equivocally adding that a bridge connection may be one indication (Report 13-14), the Master basically endorsed as "sound" the position of the United States that "the mere fact that it is connected to the mainland by a bridge or other artificial structure does not standing alone make Dauphin Island a part of the mainland." *Id.* at 13.[5]

On what basis, then, did the Special Master reach his conclusion that Dauphin Island must be deemed an extension of the mainland? However startling, the dispositive fact for the Master was "basically"

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[5] We cannot suppose the Master accorded significant weight to the fact that, in pre-history, Dauphin Island (like all of the other islands in the chain which the Master correctly concludes not to be proper extensions) was once connected to the mainland by a land bridge. Report 17. The same is undoubtedly true of the Santa Barbara Channel Islands in California, the Isles Dernieres in Louisiana and the Florida Keys, among other examples. Yet, in each case, the plea that the islands should today be treated as extensions of the mainland failed. See *United States* v. *California*, 381 U.S. 139, 170-172 (1965); *Louisiana Boundary Case*, 394 U.S. at 67 n.88; *United States* v. *Florida*, 420 U.S. 531 (1975), 425 U.S. 791 (1976). Nor does *Louisiana* v. *Mississippi*, 202 U.S. 1 (1906), suggest that the barrier islands sheltering Mississippi Sound, or Dauphin Island in particular, should be treated as part of the mainland. The opposite is the case. That decision—the landmark precedent on assimilation of islands—pointedly distinguishes between the deltaic mass of alluvial "islands" forming St. Bernard Parish and the barrier islands. 202 U.S. at 46-48. Indeed, the Court there expressly measured the water gap between Dauphin Island and the mainland—an unnecessary exercise if Dauphin Island was part of the mainland, like Isle au Pitre. 202 U.S. at 48 (quoted at Report 29-30). See page 14, *infra*.

(Report 18) what he called the "unique and significant" circumstance (*id.* at 14) that Dauphin Island lies in the mouth of Mobile Bay and therefore "at least touches upon * * * inland waters of the State of Alabama," which waters "are to be subsumed under the general category of mainland," so that the island becomes "in effect, a peninsula." *Ibid.* In sum, inland waters should be treated as part of the mainland and, therefore, an island adjoining such waters merely extends that mainland. This is fiction run riot, which to indulge today is no less plain error than it would have been a decade ago when the same argument, advanced by Louisiana, was firmly rejected.

3. The strange fact is that, ten years ago in the *Louisiana Boundary Case*, the same Special Master himself exposed the flaw in the proposition that, for island assimilation purposes, inland waters should be treated as part of the land mass. In his Report of July 31, 1974, in the *Louisiana* case, Special Master Armstrong was considering the State's claim that certain islands should be treated as extensions of the mainland because, despite their relatively great distance from land, they were quite near the agreed closing line of a bay whose inland waters should be assimilated to land (*id.* at 40-42). His rejection of that contention merits extensive quotation (*id.* at 41-42):

> For reasons heretofore stated, except for the first of the series of islands on which the beginning point of the closing line is located, the islands in question do not bear the requisite relationship to the mainland at Southeast Pass to constitute extensions thereof. Louisiana insists, however, that once the closing line conceded by the United States is drawn, the waters within that closing line become inland waters and there-

> fore constitute a part of the mainland, and that the relationship of the remaining islands to those inland waters therefore is in reality a relationship to the mainland which is sufficient to constitute them an extension thereof. Furthermore, Louisiana insists that once the nearest of the islands to that line has by this test been established as an extension of the mainland, then the relationship of the next most seaward island to the island so established constitutes it a further extension of the mainland, and thus by a kind of leapfrog relationship the furthest seaward of the islands relates back through the other islands and the waters of the bay to the mainland itself, all together constituting a single extension thereof sufficient to move the closing line seaward to the furthermost point on the low-water line of the furthermost island.
>
> While for some purposes inland waters may be considered a part of the mainland, they are nevertheless waters and not land, and therefore land bodies lying adjacent to them are not assimilable to them as such, but retain their characteristics as islands. It seems apparent that when in its opinion the Court used the term "mainland," it used it to refer to an existing body of land and not to inland waters. Otherwise, a small island lying many miles from the nearest solid land might by virtue of its proximity to a bay closing line be considered an extension of the mainland.

We entirely endorse these words, written in respect of the Garden Island Bay/Red Fish Bay complex. But an even closer parallel is, once again, to be found in Louisiana's claim to Caillou Bay, which depended on treating the chain of the Isles Dernieres as an extension of the mainland. See 1974 Report 49-51.

There, as here, at least one of the islands was not merely *near* inland water, but was actually "connected" to the mainland by inland waters and that fact was invoked by Louisiana in exactly the same way as Alabama has done in the instant proceedings. But the argument was rejected by the Special Master, and by the Court when renewed on Exceptions. See Appendix I to the Exceptions of Louisiana to the Report of the Special Master at 285-308, especially map at 302 (filed May 13, 1974); and the Court's Decree, 420 U.S. 529 (1975). It need hardly be said that the principle of equality of treatment among the States would not condone applying a more generous rule in favor of Alabama and Mississippi.

4. Precedent aside, the approach followed here is demonstrably wrong. Nowhere does the governing Convention on the Territorial Sea confuse inland water and mainland. Of course, a nation's sovereignty extends to both, with the consequence that the national "coastline" embraces inland or internal waters. But so are islands that appertain to the country jurisdictionally subject to the same regime as the mainland, without thereby eliminating the distinction between mainland and islands. In one case, it is true, the Convention treats islands as water for computation purposes. See Art. 7(3). There is no reverse rule, however. On the contrary, the text is explicit in distinguishing islands in the entrance of a bay which create multiple mouths and the water gaps in between. *Ibid.*

Thus, Article 7(3) of the Convention—in applying the semi-circle test and the 24-mile rule—measures only the water gaps between the mainland and the island or islands in the mouth of the bay. This is, obviously enough, a recognition of the separateness

of islands, even when they adjoin inland waters. And it is equally an express acknowledgement of the difference between mainland and inland water. Indeed, the rule of measuring water gaps demonstrates that all islands in the mouth of a bay cannot, on that account, be deemed part of the mainland, for (as the Special Master himself recognized, Report 22 n.8) it is settled that water gaps would not be counted at all in the case of an island treated as an extension of the mainland. See *Louisiana Boundary Case*, 394 U.S. at 62 n.83.

The proposition suggested by the Special Master has never been endorsed by the Court or by any commentator—certainly not by any of the geographers referred to in the passage from the *Louisiana Boundary Case* quoted at pages 14-15 of the Report.[6] Indeed, the Court presumably rejected this contention in affirming the Special Master's Report in the Louisiana case in 1975. 420 U.S. 529. See pages 11-13, *supra*.

5. Finally, it should be stressed that the Special Master's assimilation of inland waters to land would, if accepted here, invite substantial mischief in other cases. As we have already noticed, Special Master Armstrong himself identified the potentially endless "leap frog" effect of the doctrine, as put forward in the *Louisiana Boundary Case*. Page 12, *supra*. Other

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[6] The Special Master is plainly mistaken in suggesting that the Court construed the Convention as mandating that "islands * * * within the mouth of a bay * * * are to be considered as part of the mainland for *all* purposes." Report 16. All the Court meant (394 U.S. at 55) was that, just as only the water crossings should be counted in determining the length of a closing line partly formed by islands when applying the semi-circle test, the same principle should be followed for other Article 7 purposes, notably in applying the 24-mile rule.

scenarios easily can be envisioned, even if the principle is limited to islands that actually "touch" inland water. Nor is there any logical reason why a bay closing line itself, without any island present, ought not form the "arm" of another bay if the water behind the line is deemed land and the closing line is equated to a mainland shoreline.

Many coastal States whose legal coastlines have not been judicially determined are waiting in the wings, ready to adapt this novel theory to their own coasts if, after a false start in Louisiana, it succeeds in neighboring Mississippi and Alabama. Accordingly, we urge the Court once again to repudiate the proposition. For limited purposes, it may be useful to view inland waters as land. But a fiction must keep its place. As Justice Holmes wrote for the Court in another context, "a fiction [should] not [be] allowed to obscure the facts, when the facts become important." *Blackstone* v. *Miller*, 188 U.S. 189, 204 (1903).

II. ASSUMING THAT DAUPHIN ISLAND IS PROPERLY TREATED AS AN EXTENSION OF THE MAINLAND, THE WHOLE OF MISSISSIPPI SOUND NEVERTHELESS DOES NOT QUALIFY AS A JURIDICAL BAY

Having determined that Isle au Pitre at the west of Mississippi Sound and Dauphin Island at the eastern end both should be treated as part of the mainland and proper bay headlands (Report 11, 18), and that those two points can be connected by a series of lines bridging the water gaps between the barrier islands totalling less than 24 miles (*id.* at 12, 18), the Special Master all too easily concluded that the whole of Mississippi Sound qualifies as a juridical bay. *Id.* at 18-22. This, we believe, is a patently erroneous application of controlling standards. In our

view, the right result—if, contrary to our primary argument, Dauphin Island must be treated as an extension of the mainland—is to recognize two discrete and unconnected bays: the first, on the west, comprising Lake Borgne and that portion of Mississippi Sound enclosed by a line running north from Isle au Pitre to the easterly promontory of Bay St. Louis; the second, on the east, closed by a line from the westernmost point of Dauphin Island to Point Aux Chenes on the mainland. See Chart 3, App., *infra*. The water area between these two bays, we submit, is not a bay, nor any part of a bay, but rather a narrow "corridor," some 50 miles long and at most ten miles wide, that can be enclosed as inland water only under the straight baseline system of Article 4 of the Convention on the Territorial Sea, which, for better or for worse, the United States has eschewed.

1. Our point is obvious enough when the map is consulted. See, *e.g.*, Chart 1, App., *infra*. If we ignore the waterways cutting through the deltaic mass at the lower left of our map and treat Isle au Pitre as the tip of that peninsula,[7] it seems natural to close off the sheltered waters at the west by drawing a

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[7] The formal stance of the United States, indicated on official large-scale charts, has been that the proper southern headland of the bay at the west of Mississippi Sound is a formation slightly west of Isle au Pitre. However, as the Special Master recites (Report 10), we admitted that Isle au Pitre properly "might" be treated as an extension of the mainland, and the Master so held (*id.* at 11). We do not now except from that conclusion. Under our submission that the only bay at the western end of the Sound is defined by a closing line to the eastern promontory of Bay St. Louis on the northern mainland, it makes no practical difference whether the southern anchor point of that line is Isle au Pitre or a more westerly point.

line *northerly* to the relatively near mainland of Mississippi, not *easterly* to a point on Dauphin Island five times more distant. See Chart 3, App., *infra*. And the same approach no less forcibly suggests itself at the other end of the Sound. Supposing Dauphin Island to be connected to Cedar Point, we easily discern a sheltered water body defined by the long westerly projection of Dauphin Island and a line to the near mainland at the north, most generously the headland selected by both Alabama and the United States, Point Aux Chenes. See Report 8 n.3; Chart 3, App., *infra*. Here, also, it is entirely artificial to stretch a closing line some 50 miles west to Isle au Pitre.

The Special Master went astray, as it seems to us, because he began with the wrong question. His focus was on Mississippi Sound as a single unit and, with that "mind-set," he applied the Convention tests to determine if they foreclosed recognition of the putative bay. In our view, that approach improperly prejudiced the outcome. Instead, the Master should have asked: What is the natural boundary of the internal waters defined, on one side of the Sound, by the headland of Isle au Pitre, and, on the other, by the headland of Dauphin Island? Once the indicated closing lines of the separate bays had been drawn to the northern mainland, it would have been perfectly clear that the main body of Mississippi Sound in between could not qualify as a bay, or as part of one, under the presently governing standards of Article 7 of the Convention.

2. It will no doubt be said that we ignore the barrier islands "sheltering" the central portion of Mississippi Sound and that their presence justifies the Special Master's conclusion. That is, indeed, the method followed by the Master: he invoked the is-

lands to shorten the closing line to less than 24 miles (Report 12, 18), to reduce the diameter on which the semi-circle test is based (*id.* at 18), and, also, to find that the Sound as a whole qualifies as "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast," in accordance with Article 7(2) (Report 18-22). But, once again, this is reasoning backwards.

The Court has firmly settled that "Article 7 [of the governing international Convention] does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Louisiana Boundary Case*, 394 U.S. at 67 (footnote omitted). It is common ground that the barrier islands, other than Dauphin Island, cannot be deemed extensions of the mainland. Report 8. Therefore, those islands must be conceptually erased in considering whether the long central stretch of Mississippi Sound qualifies as part of a bay. So viewed, it seems obvious that nature has carved no "well-marked indentation" into the essentially flat mainland coast, and that the waters of the central Sound are in no sense "landlocked" within "the jaws of the mainland."

Yet, unless a bay-like indentation exists, there is no warrant for going further and applying the special "island fringe" rules—given that Article 4 of the Convention is not in play. See note 2, *supra*. The exceptional procedure of counting only the water gap portions of a closing line is followed when, "because of the presence of islands, an indentation has more than one mouth" (Art. 7(3))—not where there is no indentation. See *Louisiana Boundary Case*, 394 U.S. at 55. So, also, there must be a bay before one reaches the question whether a closing line should be

pulled inward or bent outward on account of fringing islands not intersected by a direct headland-to-headland line. It was to aid in the resolution of that issue, left undecided by this Court (394 U.S. at 58-60 & n.79), that Drs. Hodgson and Alexander devised the "50% test," cited by the Special Master here. Report 21.[8] But, contrary to what the Master apparently believed, the test was never meant to determine whether given waters qualified as a bay. See Hodgson & Alexander, *Towards An Objective Analysis of Special Circumstances* 17, 20 (1972).

3. At the end of the day, the Special Master appears to have acquiesced in a plea to force the hand of the United States, which has consistently declined to invoke Article 4 of the Convention to enclose Mississippi Sound with a system of straight baselines anchored on the barrier islands. To be sure, the end result seems reasonable enough. Presumably, international law would not invite it unless that were so. Nor would we have once described Mississippi Sound as inland if such a claim involved plain overreaching. But, the apparent "reasonableness" of the Master's

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[8] Indeed, it is only by applying this 50% test that a closing line of less than 24 miles can be fashioned for Mississippi Sound. It appears that a straight line between the western tip of Dauphin Island and Isle au Pitre would intersect only Petit Bois Island, and a revised line anchored on the western tip of the latter island would touch no other barrier island before reaching Isle au Pitre. Thus, the total water portion of the closing line would far exceed 24 miles unless the line is pulled inward to follow the course of the barrier islands. The Court has not decided whether this is ever proper. *Louisiana Boundary Case*, 394 U.S. at 58-59 n.79. We nevertheless believe that such a "drawing inward" would be appropriate here, *if* there were indentation, because the islands account for more than 50% of the closure.

ultimate conclusion cannot justify it. The Court has stressed that the decision whether to use straight baselines is reserved to the national Executive and is not subject to judicial review. *United States* v. *California*, 381 U.S. at 168; *Louisiana Boundary Case*, 394 U.S. at 72-73. Obviously, it is no more permissible to achieve the same end by misapplying the bay rules of Article 7. Yet, as we believe, that is what has happened here. We therefore urge the Court—if it accepts the fiction that Dauphin Island is an extension of the mainland—to redraw the boundary of the bay formed by that island as a line from its western tip to Point Aux Chenes on the mainland to the north. See Chart 3, App., *infra*.

III. MISSISSIPPI SOUND IS NOT PROPERLY DEEMED AN HISTORIC BAY

The Special Master's alternative holding that Mississippi Sound qualifies as historic inland waters is no less surprising than his creation of a Dauphin Peninsula. If anything, this ruling even more sharply conflicts with the Court's jurisprudence on the subject, and, indeed, with the Special Master's own earlier historic inland water analysis in the *Louisiana Boundary Case*. Yet, once again, our disagreement with the Master turns on no disputed fact, nor on the relative weight accorded to expert testimony. Here, also, only the Master's legal reasoning is implicated; and the Court can assess the correctness of his conclusion without going beyond the facts recited in the Report itself (at 28-55).

1. The Court has unambiguously prescribed the standards which govern a claim to historic inland water. *Louisiana Boundary Case*, 394 U.S. at 23-29, 76-78; *United States* v. *Alaska*, 422 U.S. 184, 189,

196-203 (1975). What must be shown is (1) the successful exercise of authority over the area as inland water; (2) long continuity to that exercise; and (3) unequivocal foreign acquiescence in the claim. The cases demand a demonstration that sovereignty was exerted to exclude foreign navigation and other presence from the area. A historic bay claim cannot be proved by showing enforcement of State or Federal laws against United States nationals. Nor is mere absence of protest sufficient where there has been no unambiguous inland water claim.

The reason for requiring such clear evidence is that historic claims, by definition, do not satisfy the juridical rules. As ad hoc exceptions, they cannot be known to the international community, much less accepted by it, unless the assertion is notorious. Moreover, being a "non-conforming use," "historic" title does not immediately spring into legal existence when it suits the coastal state to assert it: it only gradually ripens when recognized by the community of nations, after long and open exercise of dominion. In effect, such historic title is acquired by "adverse possession," a persisting trespass ultimately validated by time and acquiescence. *Juridical Regime of Historic Waters Including Historic Bays*, U.N. Doc. A/CN. 4/143, at 46 (1962), cited in *Louisiana Boundary Case*, 394 U.S. at 76 n.103. Beyond this, as the Court noted in *Alaska*, 422 U.S. at 197, the exercise of authority must be commensurate in scope with the nature of the title claimed. Therefore, proof of historic *inland* water requires assertions of sovereignty—to exclude all foreign navigation in innocent passage—which are inconsistent with any lesser juridical status. And the exercise of sovereignty must be specific to the particular body of

water. Adherence to general rules that might encompass the claim now advanced will not suffice. Nor, indeed, will mere declarations avail, even specific statutes, unless implemented by actual possession for so long as to constitute a usage.

The requisite degree of proof is significantly increased when, as here, the United States officially *disclaims* sovereignty over the area. To be sure, such a disclaimer is not itself dispositive. If only to prevent the federal government from "abandon[ing]" an earlier "consistent official international stance" "solely to gain advantage in a lawsuit to the detriment of [a State]" and from impermissibly "conracti[ng] a State's recognized territory" (*Louisiana Boundary Case*, 394 U.S. at 74 n.97, 77 n.104), the Court has "indicated its unwillingness to give the United States * * * complete discretion to block a claim of historic inland waters." *Id.* at 77. But the rule remains that a State claim to historic waters will survive a federal disclaimer only if it is "*clear beyond doubt*" that historic title has "*already ripened* because of *past* events." *Louisiana Boundary Case*, 394 U.S. at 77 & n.104 (emphasis added); *United States* v. *California*, 381 U.S. at 175. No State heretofore has met that burden of proof; California, Louisiana, Florida and Alaska each have unsuccessfully advanced historic bay claims. There is no warrant for singling out Mississippi Sound as a uniquely stronger case.

2. That the Special Master here was the first to reach the elusive goal is, we submit, a consequence of winking at the established rules and ignoring the posted road signs. His Report indiscriminately recites the history of the Gulf Coast and the history of the federal positions on delimitation matters generally. He tells us that our predecessor sovereigns—

the Spanish, French and British—all thought they owned Mississippi Sound (Report 28); that, following the Louisiana Purchase, there was congressional discussion reflecting appreciation of the Sound as an artery of "interior water communication" and a "channel of important commerce" (*id.* at 36-39); that, during our Civil War, a fort was built on Ship Island, thereby showing that we were prepared to repulse belligerent entry into the Sound (*id.* at 38); that, in the early twentieth century, this Court, in adjudicating the lateral boundary between Louisiana and Mississippi, described the Sound as an enclosed arm of the sea wholly within United States territory (*id.* at 29-33); that, later this century, the United States suggested or agreed to various formulations of international law under which bodies of water like Mississippi Sound might have been regarded as internal (*id.* at 40-54); that some agencies and officers of the United States acquiesced in the States' view that the Sound was within their boundaries (*id.* at 42-43); and, finally, that, earlier in this tidelands litigation, we conceded the inland status of Mississippi Sound (*id.* at 32, 47). In the Master's view, the United States disclaimer—embodied in the 1970 publication of official charts depicting territorial sea lines in the Sound, obviously inconsistent with its character as inland waters—came too late in the day, and was impermissibly motivated by this domestic law suit (*id.* at 47). Therefore, the "claim" which had previously been announced to the world must be allowed to survive (*ibid.*).

This somewhat casual approach, we submit, is wholly at odds with the governing standards announced by the Court. In the end, what the Master has done is to hybridize the juridical and historical inquiries. The core of his holding is that Mississippi

Sound, if no longer a juridical bay satisfying the standards of the Convention to which we adhered in 1961, must be treated as an historic bay because, under earlier conceptions or proposed rules, it did qualify as internal water. That is simply no basis for an "historic bay" determination. Nor do the facts recited independently sustain such a claim, as we now demonstrate.

3. The bulk of the States' evidence at trial concerned the Spanish, French and British colonies. Much testimony and many documents were presented on the diverse means by which those sovereigns sought to ensure the security of their outposts. The Royal Navy had vessels patrolling the coast from Pensacola towards New Orleans (Rea Tr. 230-231). The Spanish employed a sort of coast guard as well, which deployed along the Alabama and Mississippi shores with the objective of preventing privateering (Holmes Tr. 438-440). Experts opined that the British and French thought that they possessed (under boundary descriptions similar to those with which Alabama and Mississippi were admitted to the Union) everything —water column, seabed and islands out to 6 leagues from the coast (Rea Tr. 291). The Spanish were said to be even more expansive, asserting sway over the entire Gulf all the way to the Yucatan (Holmes Tr. 445-446, 515).

It appears, however, that these prior sovereigns did not in any way differentiate *inland* from *territorial* jurisdiction. Moreover, as Alabama itself admitted below (Alabama Main Post Trial Brief 225), "evidence indicates that foreign nations did not acquiesce in French, British or Spanish exercise * * *." (See Holmes Tr. 504-510; Rea Tr. 280-282.) Thus, it is doubtful whether any of the colonial powers effectively reduced Mississippi Sound to an inland water

regime. But, even if they had, that would tell us little, if anything, about the status of the Sound as internal waters of the United States after American acquisition of the area, or as inland waters of Mississippi and Alabama after their admission to the Union.

Indeed, it hardly can be maintained that, where no private rights were at stake, the United States was bound to follow the practice of prior sovereigns in claiming offshore waters or water bottoms, whether as "inland" or "territorial." We were free to be more restrained in the interest of freedom of the seas (see *United States* v. *California*, 332 U.S. 19, 32-33 (1947), or, within the limits permitted by international law, to be more expansive (see *Manchester* v. *Massachusetts*, 139 U.S. 240, 263-264 (1891)). Moreover, upon their admission to the Union on an equal footing, the States at least presumptively relinquished any unusually broad offshore rights derived from earlier history. *E.g.*, *United States* v. *Texas*, 339 U.S. 707, 716-720 (1950); *United States* v. *Maine*, 420 U.S. 515, 522-524 (1975). Of course, Congress could later retrocede submerged lands out to generous maritime boundaries it had once approved. *United States* v. *Louisiana*, 363 U.S. 1 (1960); *United States* v. *Florida*, 363 U.S. 121 (1960). But, except as the United States chose to confirm them, colonial claims are wholly irrelevant. See *United States* v. *Louisiana*, 363 U.S. at 35, 38, 71.

In a different case, the critical moment might be when Mississippi and Alabama became States, in 1817 and 1819, respectively. But that is an investigation already concluded, which disappointed both States. *United States* v. *Louisiana*, 363 U.S. at 79-82. As the Special Master here recognized (Report 29-35), the Court has long since rejected the argu-

ment that the Acts of Admission, on their face, assert any claim to the waters or submerged lands of Mississippi Sound. *Id.* at 81, 82. Accordingly, we pass on to later events.

4. The Master apparently accords considerable significance (Report 36-38) to early recognition in the American government that "[t]he chief navigational utility of Mississippi Sound is intracoastal." He draws this conclusion from documents evidencing the legislative debate that began in the early 1820s over the military security of the Gulf Coast region in general. He chooses from these documents a series of anecdotal references to the Sound as a "little interior sea," a "broad interior water communication," a "broad sheet of water * * * [t]hrough [which] passes the inland navigation * * *." And, indeed, we readily accept that Mississippi Sound historically has been used as a connector of an intracoastal waterway because of its (for the most part) shallow and sheltered water. But this does not remotely establish the inland character of the Sound.

Many maritime areas in the world are similarly not international waterways. The mere absence of foreign vessel traffic, however, is no signal of historic (or, for that matter, juridical) inland water. See *United States* v. *California*, 381 U.S. at 171-172. These geographic factors and the economic consequences which flow from them are not recognized in international law as significant to an historic bay claim. *Juridical Regime of Historic Waters*, *supra*, at 56-58. Moreover, the upshot of all the Committees' debate over what measures to take to protect this area was the conclusion that Mississippi Sound was so "open" as to be indefensible against foreign mili-

tary encroachment.[9] To the extent that the world was listening, the message conveyed was that the United States would *not* attempt to exclude foreign ships and claim Mississippi Sound as a "mare nostrum."

5. The Master seems to place almost dispositive reliance on the eventual construction of Fort Massachusetts on Ship Island. Adverting to that event, the Report states (at 38): "There could hardly be a clearer indication that the United States claimed the waters north of that island as its own, and was prepared to repel any belligerent attempt to enter them, although it was never called upon to do so; and any foreign nation which was in the least attentive must have been aware of that fact." Both factually and legally, we suggest the Master has made too much of too little.

Work on a permanent fortification on Ship Island was not begun until 1859, progress was delayed because of a lack of funds and the advent of the Civil

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[9] President Monroe's view (Alabama Exhibit 17-18, at 369) was that "when the distance from one point to another is considered, it is believed that it would be impossible to establish works so near to each other as to prevent the landing of such [an enemy fleet]." In 1822, the House Committee on Military Affairs concluded that it would be inappropriate to waste resources on a post at Dauphin Island because it could neither protect the Mobile Bay ship channel nor the pass between Mobile Bay and Mississippi Sound. It could not protect the coasting trade or provide relief from a blockade (Joint Exhibit 137). In 1840, the Senate Committee on Military Affairs determined not to incur the expense to build forts on Ship or Cat Islands because these could not protect all of the passes to the Mississippi and Alabama mainland coast, and because "there is not supposed to be * * * a single object comparatively of high value on that part of the coast" (Joint Exhibit 139).

War, and it was never completed. The Union garrison apparently destroyed the fort in May 1861. The Confederates were slow to occupy it, not taking it over until early July of 1961, and they evacuated the island after setting fire to the buildings and lumber on September 17 of the same year. For two years, the island was the headquarters of the West Gulf Blockading Squadron and the base of operations for attacks on the Confederate forts guarding the mouth of the Mississippi. In October 1864, the island fort was turned into a prison camp for Confederate soldiers and was so used until the end of the war. In 1870, the last garrison was withdrawn from the fort, and in 1875, it was abandoned altogether. See Weinert, *The Neglected Key to the Gulf Coast*, 31 Journal of Mississippi History 269-301 (1969) (United States Exhibit 14-15); Caraway, *The Story of Ship Island*, 4 Journal of Mississippi History 76-83 (1942) (United States Exhibit 14-26).

It is not obvious how the story of the Ship Island fort can be marshalled in support of an historic bay claim. It says nothing about the exclusion of foreign navigation; it goes to the United States' suppression of its civil insurrection. What is more, even if the building of a fort—never really completed—is some evidence of some kind of claim, the abandonment of that fort within 15 years suggests a retreat from the claim. To repeat the Master's words, "any foreign nation which was in the least attentive must have been aware of that fact" as well. To the extent that the short history of Fort Massachusetts is instructive for our case, it indicates, once again, that the United States quickly abandoned any claim to Mississippi Sound as an "internal" bay.

At all events, a military fort is not usually designed to impede peaceful vessels engaged in "innocent pas-

sage." As the Master himself put it, the presence of Fort Massachusetts at best shows an intent "to repel any *belligerent* attempt to enter [the Sound]." Report 38 (emphasis added). Yet, of course, such a stance is appropriate not only for inland waters but also with respect to a nation's *territorial* waters. See *Louisiana Boundary Case*, 394 U.S. at 22-26. And, as we believe, that is the character of most of the waters of the Sound, including the several passes between the barrier islands, a 3-mile protective belt around each of them and adjoining the mainland coast, and, perhaps most important, the sea route to New Orleans through Lake Borgne. In short, even the actual interdicting of enemy warships is not remotely an assertion of *inland* water status for the area involved. Obviously, mere preparations to that end cannot be so viewed.[10]

6. The Master finds (Report 29-22, 39) more corroboration for his growing thesis that the Sound has historically been looked upon as inland in passages from the opinion in *Louisiana* v. *Mississippi*, 202 U.S. at 36-48. In rejecting the contention of Mississippi that the Sound was open sea in which the doctrine of thalweg ought not apply, the Court there said (202 U.S. at 48):

> Mississippi's mainland borders on Mississippi Sound. This is an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward

[10] We note, additionally, that the United States has military installations in places as distant from its internal jurisdiction as the Azores and Cuba, which are intended to afford some measure of control over belligerent use of sea lanes and airspace. Surely it can be suggested that continuous maintenance of these installations transforms all of the intervening water into our historic bays.

> from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide. Such openings occur between Cat Island and Isle à Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Horn and Petit Bois Islands; between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bay.

We do not agree with the Master that this language constitutes a holding that Mississippi Sound was inland water. Certainty, that is not a necessary reading, as the Court focused on the fact that the water gaps are less than six miles—twice the breadth of *territorial* water. The States' contention (*e.g.*, Mississippi Main Post Trial Brief 14) that the Court was applying "customary international law" in 1906 seems clearly contradicted by the Court's decision in the second *California* case, 381 U.S. at 164, that there was, before the Geneva Convention, "no international accord on any definition of inland waters * * *." At all events, as the Master himself observed (Report 31-33), the United States is not bound by a ruling in lateral-boundary litigation to which it was not a party. Indeed, the Court has twice dismissed *Louisiana* v. *Mississippi* as having no bearing on federal-state disputes over maritime belts or submerged lands. *United States* v. *California*, 332 U.S. at 37; *United States* v. *Louisiana*, 363 U.S. at 70.

7. We cannot, of course, avoid the point that in our 1958 Brief in Support of Motion for Summary Judgment on Amended Complaint in the earlier phase of this case (at 254), we construed *Louisiana* v. *Mississippi* as describing Mississippi Sound as inland water which therefore passed to the States on their entry into the Union. But that embarrassment is no greater here than with respect to like concessions con-

cerning Chandeleur Sound and Caillou Bay on the Louisiana coast. See *United States* v. *Louisiana*, 363 U.S. at 67 n.108. Louisiana's attempt to invoke estoppel was firmly rejected by the Court. *Louisiana Boundary Case*, 394 U.S. at 66-67 n.87, 73-74 n.97. The same result is appropriate here.

It is equally unjustified to conclude from the statement in the cited brief or anything else, as the Master does (Report 32-33), that "for more than half a century it was accepted by the United States that * * * Mississippi Sound was inland waters." The 1958 brief was apparently the first occasion on which the United States specifically addressed that question.[11] And the stance then taken barely survived the decade. In 1961 the United States ratified the Convention on the Territorial Sea which, as this Court soon held, required the explicit drawing of straight baselines to accord inland water status to areas screened by islands that do not qualify under the bay rules. *United States* v. *California*, 381 U.S. at 167-169; *Louisiana Boundary Case*, 394 U.S. at 67-71. Having marked no such straight baselines enclosing Mississippi Sound on its official charts, the United States was at least impliedly recanting any claim to the Sound as inland. See Convention, Art. 4(6), reproduced in 381 U.S. at 168 n.34 and 394 U.S. at 68

[11] As the Special Master sets out (Report 42-43), the Secretary of the Interior had in 1951 in a letter to the Governor of Mississippi agreed that the oil and gas leasing rights inside the barrier islands would go to the State. Of course, this is reminiscent of the circumstances of the first *California* case, 332 U.S. at 39-40, where Interior Department officials also had expressed a belief that California owned the seabed resources in question. The Court, ruling that the paramount rights in the territorial belt rested with the United States, stated that those rights may not be forfeited through agencies' mistakes or negligence.

n.89. The improvident error of counsel in a single sentence of a later brief filed in a controversy with Louisiana alone, is entirely unlikely to have been noticed beyond the parties and obviously does not, standing alone, amount to an effective assertion of inland jurisdiction. See Reply Brief for the United States at 30, in *United States* v. *Louisiana*, No. 9, Orig. (filed Sept. 1968).

8. Finally, the Master recites (Report 42-45) a variety of generalized antecedent formulations of what international law should or might be. He discusses the Webb letter of 1951 (*id.* at 48-50), in which the Acting Secretary of State attempted to describe the principles of delimitation employed by the United States in its conduct of foreign policy, which we invoked in the second *California* case as the governing rule under the Submerged Lands Act. Although this is far from clear, it may be that Mississippi Sound would have fit within those principles, which were first propounded at the 1930 Hague Conference. But whatever the outcome of such an anachronistic inquiry, it cannot affect the States' historic bay claim.

The dispositive fact is that the Court has squarely rejected the relevance of the Webb letter and other pre-Convention formulations for coastline delimitation. *United States* v. *California*, 381 U.S. at 163-165. It can hardly have been intended that these discarded sources would nevertheless control inland water disputes on the premise that States could establish historic bay claims simply by showing that their water bodies might have qualified under some outdated juridical principles. Accordingly, it seems to us a wholly academic exercise to match Mississippi Sound against the criteria which the United States advanced in the Alaska Boundary Arbitration of 1903

(Report 51), the Boggs formulae of the 1930s (*id.* at 41), the principles underlying the Chapman Line of 1950 (*id.* at 41-42), or the understanding evinced by the parties in the *Anglo-Norwegian Fisheries Case* in 1951 as to the general American postulates concerning waters behind closely fringing islands (*id.* at 50-51). The most that could be said from the material culled by the Master is that foreign governments might have had an inspecific impression that the United States favored, before the Convention, a regime under which it might have been permissible to draw some straight baselines to fringing islands in some circumstances. Assuredly, no foreign government could have deduced from these general formulations that the United States was making a specific claim to Mississippi Sound. What is more, as even the States urged upon the Master, the essence of a historic bay claim is a squatter's adverse possession, as opposed to occupation supposedly consistent with international rules.

In sum, the States have entirely failed to demonstrate effective, persistent and notorious exercise of inland jurisdiction over Mississippi Sound such as might have ripened into historic title. As it seems to us, the evidence in the present record, as summarized by the Special Master, is significantly weaker than it was in the cases involving California, Louisiana and Alaska—where at least some instance of arresting foreign fishermen was shown.[12] Accordingly, we deem it plain that the present claim should be rejected.

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[12] For the arrest incidents in those cases, see *United States* v. *California*, 381 U.S. at 174-175; Report of the Special Master of July 31, 1974, at 20-21, in No. 9, Orig., *United States* v. *Louisiana*, approved, 420 U.S. 529 (1975); *United States* v. *Alaska*, 422 U.S. at 201-203.

CONCLUSION

The Report of the Special Master should be disapproved insofar as it recommends that Dauphin Island may be treated as an extension of the mainland and a proper headland for an Article 7 bay in Mississippi Sound, and insofar as it recommends that Mississippi Sound be declared an historic bay. Instead, the United States urges the Court to fix the seaward limit of the submerged lands owned by the States of Mississippi and Alabama at the outer line of the territorial sea as depicted on official charts issued by the National Ocean Service.

Respectfully submitted.

REX E. LEE
Solicitor General

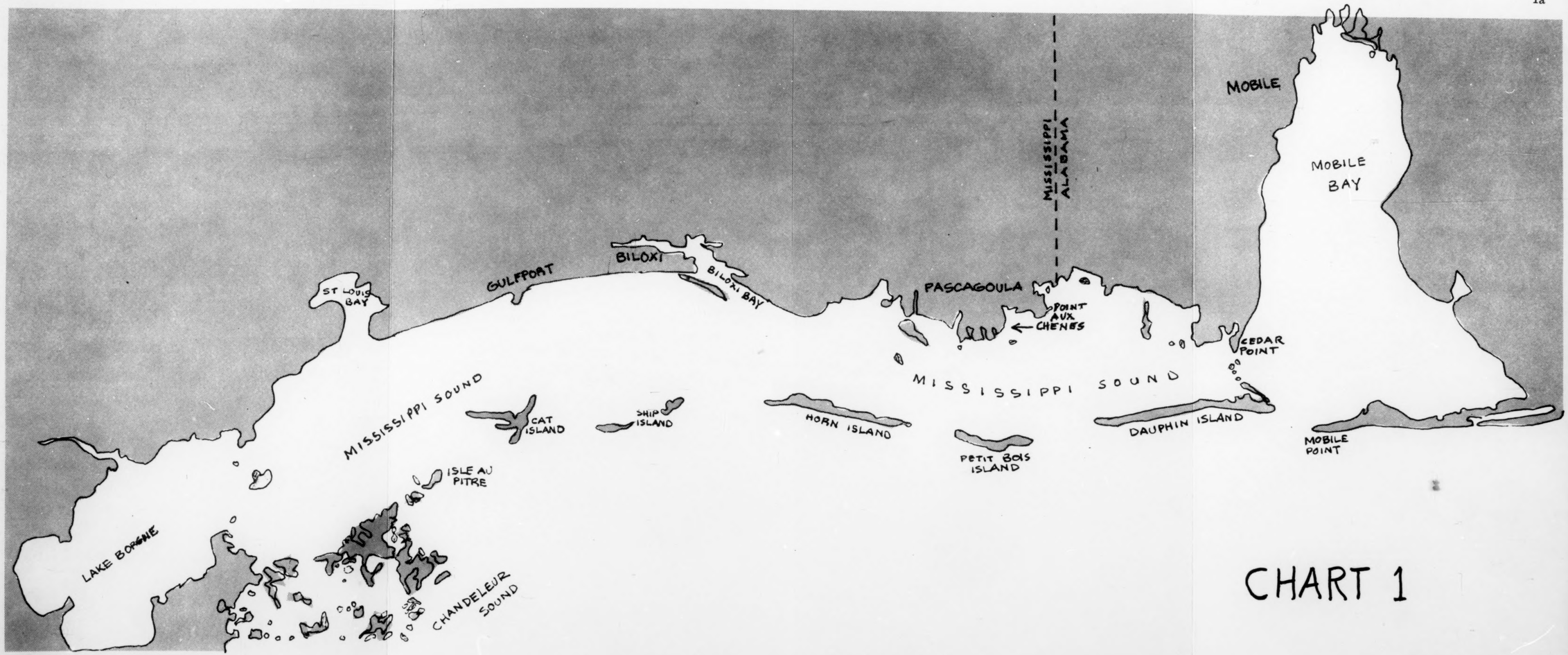
F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

DONALD A. CARR
Attorney

JUNE 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 585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ALABAMA
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GULFPORT
BILOXI
BILOXI BAY
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POINT AUX CHENES
CEDAR POINT
MISSISSIPPI SOUND
CAT ISLAND
SHIP ISLAND
HORN ISLAND
PETIT BOIS ISLAND
DAUPHIN ISLAND
MOBILE POINT
ISLE AU PITRE
LAKE BORGNE
CHANDELEUR SOUND

CHART 1

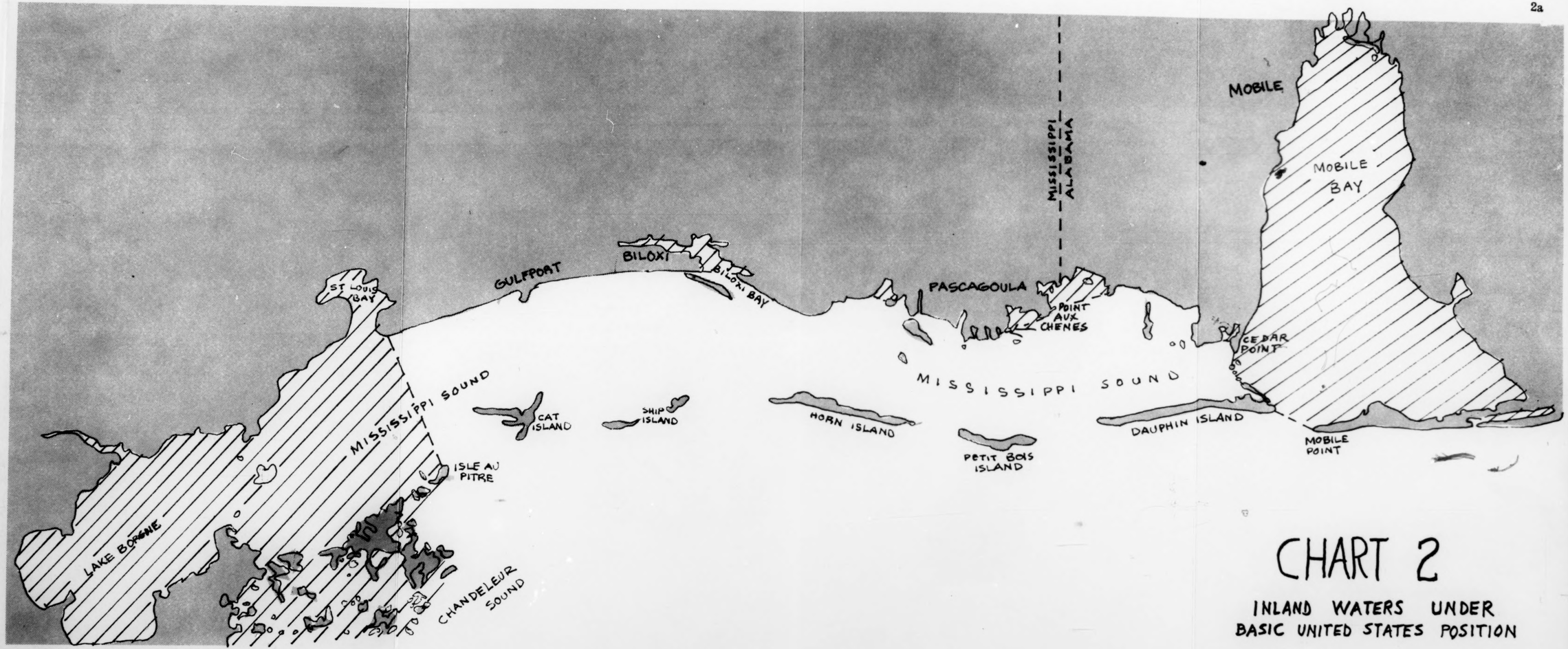

CHART 2

INLAND WATERS UNDER
BASIC UNITED STATES POSITION

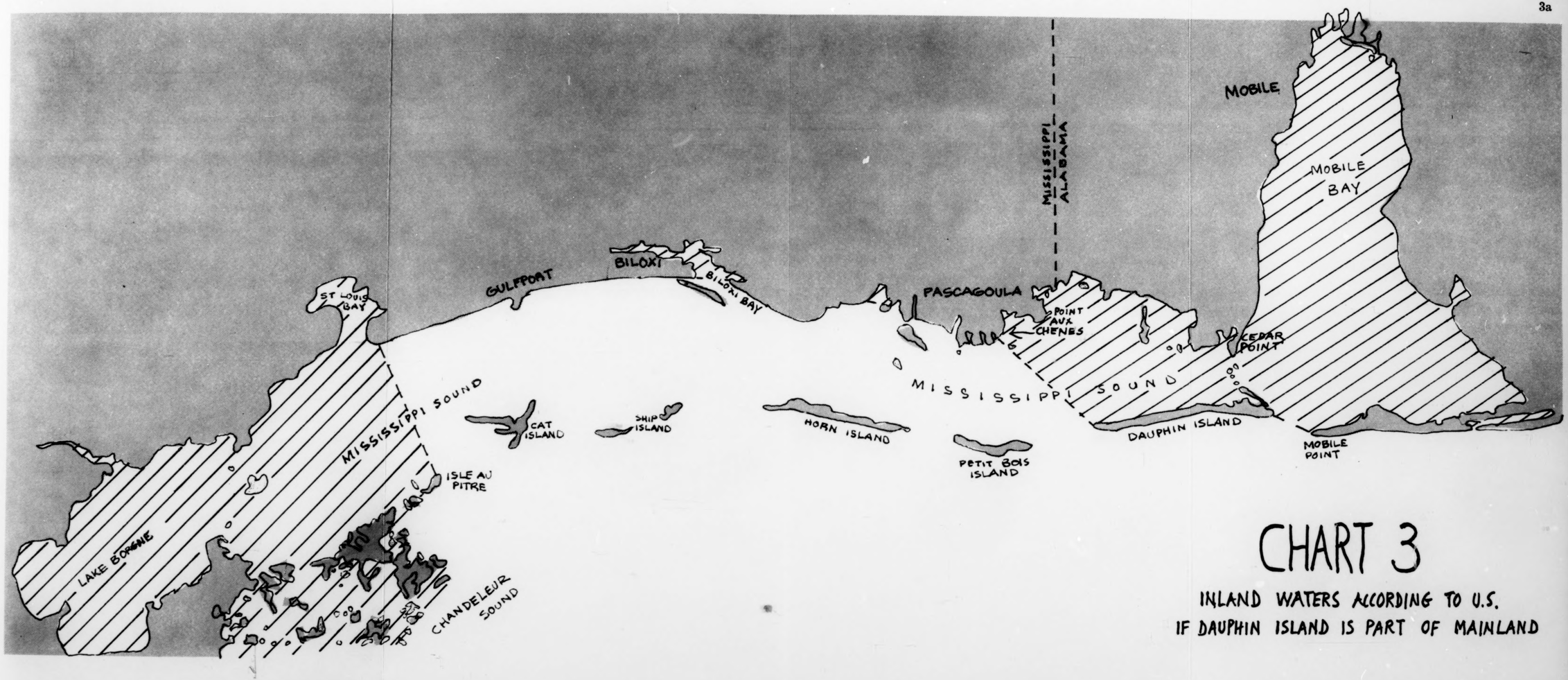

CHART 3

INLAND WATERS ACCORDING TO U.S.
IF DAUPHIN ISLAND IS PART OF MAINLAND